

2010 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION NEGOTIATION COMPETITION FACT PATTERN

This problem has been structured for the time constraints of this competition and, thus, real-world considerations have been simplified considerably. Accordingly, ignore all prior owner/operators of the mine as potentially responsible parties except for those parties specifically identified here. Similarly, disregard any other statutory or common law theories of liability and focus only on the issues framed by the problem.

From 1986-2006, the Sainte Devote Minerale Group (Sainte Devote) mining company operated an open-pit gold mine (the Mine) in Mirabeau County, California. County records show that underground mining occurred at the Mine property from the late 1800's until 1940, when a presidential executive order ceased all gold mining during World War II. The underground mining left extensive tunnels and chambers underlying the Mine property. These tunnels and chambers filled with groundwater after the mining ceased. Groundwater testing prior to modern mining indicated that the water in the historic underground tunnels was high in arsenic, sulfate, and selenium.

Sainte Devote, a mining company with headquarters in Monte Carlo, Monaco, has operations all around the world. It is an experienced mining company, with extensive knowledge of mining costs and post-mining closure, maintenance, and environmental issues. It considers itself an environmentally friendly entity, and advertises itself as such.

In the late 1970's, in light of rising gold prices, Sainte Devote purchased the Mine property through a California subsidiary, Cal Sainte Devote. Sainte Devote scoped the Mine property by drilling extensive holes throughout the historic area of mining. The drilling revealed marketable gold reserves. Accordingly, Sainte Devote prepared a mining plan (the Plan) that provided for an open pit mining method. The open pit was located on top of the historic underground mine tunnels and chambers.

In the pre-mining, planning phase of operations, Sainte Devote's president, Gascon Massanet, headed up a working group that prepared the mining plan for the Mine. The purpose of the plan was to select the most cost-effective mining method. Open pit mining was identified as the most cost-effective method. Underground mining was a possibility, but prohibitively expensive. The benefit of underground mining was that it would not expose rock surfaces to air, and, thus, would cause less pollution.

When it was initially preparing the mining plan and scoping the ore body at the Mine, Sainte Devote hired Reality Environmental (Reality) to assess environmental issues at the site. Reality prepared an assessment of site hydrogeology and water quality issues. It concluded that the existing underground workings at the site were interconnected with the groundwater table. Historic mining had polluted the groundwater and if the rock surfaces in the underground workings were exposed to air as the miners dug down, creating the anticipated open pit, there would be more pollution. The proposed open pit mine, if dug, would connect the tunnels and chambers of the historic underground workings with fractures in the bedrock potentially releasing a plume of contamination into the groundwater table. The Pit Lake could potentially spill over and pollution would flow downgradient through the groundwater, contaminating local

wells and water supplies. Reality thus recommended an underground mining method over open pit mining.

Massanet received and reviewed this report. After reviewing it, Massanet recommended that the working group seek a second opinion. Accordingly, Sainte Devote hired a second consultant, Placebo Environmental (Placebo). Placebo prepared a second assessment of site hydrogeology and water quality issues and, like Reality, it concluded that significant water pollution would result if the rock surfaces of the underground workings were exposed to air. But Placebo concluded that the pollution would never migrate, because even after the Pit Lake refilled with water, evaporation of water from the Pit Lake would always exceed groundwater recharge, and the Pit Lake would, therefore, naturally “capture” all the pollution and hold it in one place. Relying on this report, and deciding to worry later about developing a plan for treating the anticipated pollution, Massanet and the working group proceeded with the open pit mining plan.

Another part of the mining plan involved designing a tailings management facility. Mine tailings are what is left over after the ore-bearing rock is treated to remove the gold. At the Mine, based on the gold extraction method, the tailings formed a “slurry,” a mixture of super-fine, heavily saturated pulverized rock created by the process of extracting gold.

Massanet was personally involved in selecting and proposing to the regulatory agency a novel technology called “beaching” for the containment of the mine tailings. Beaching involved spreading the tailings in layers on an engineered membrane. When the tailings dried, they formed a clay-like layer that itself became part of the liner of the tailings facility.

The beaching tailings containment method had been used at one other site; however, at that site, the distance to groundwater was seventy feet and the tailings facility was on impermeable rock. At the Mine, distance to groundwater was seven feet, and there were seeps and springs in the proposed tailings area. At meetings with the regulatory agency, Massanet personally assured the agency the beaching tailings method would more than adequately protect groundwater.

In 1986, mining began. As mining progressed, non-gold-bearing rock was discarded in a rock pile (the Rock Pile) adjacent to the open pit. As the pit grew, and the miners began to dig down into the historic underground tunnels, they encountered groundwater. In order to keep mining, the miners pumped the groundwater into water trucks. The water was used for on-site dust control.

The pumping of the groundwater from the pit drew down the groundwater table for a considerable area surrounding the pit, creating what is known as a “cone of depression,” as pumping increased to facilitate deeper mining.

Sainte Devote mined a substantial amount of gold. Due to price fluctuations in the gold market and extremely high operating costs, however, it suffered losses every year. The mine plan, however, provided for mining for 20 years, through 2006, and Sainte Devote kept mining. In this regard, the onsite mine manager said in his deposition: “We’re miners. We mine. The plan says we go to 2006, so we went to 2006.” The Rock Pile and the pit grew until the pit was approximately 70 acres across and 800 feet deep. The Rock Pile covered approximately 350 acres, and looked like a barren wasteland, with absolutely no vegetation.

In 2006, with its balance sheets showing multi-million-dollar losses, Sainte Devote closed the doors on the Mine. The moment pumping of the groundwater ceased, the pit immediately began to refill with the surrounding groundwater, creating an open pit lake (Pit Lake). Pit Lake modeling studies done by Sainte Devote's experts indicate that eventually all the nearby groundwater will flow into the pit until the cone-shaped depression created by mining is filled and groundwater recharges to historic levels. The Pit Lake water is highly contaminated with arsenic, sulfate, and selenium. At the historic level of groundwater recharge, there is an interconnection through rock crevices between the pit wall and a nearby creek. Eventually, water from the Pit Lake will flow out to the adjacent creek, a tributary to the Champagne River, already one of the most polluted rivers in the State of California.

As it was winding down the Mine in 2006, Sainte Devote approached the County of Mirabeau with an idea. Sainte Devote proposed to sell the property to the County for \$1. The County could then use the flat portions of the Mine property for redevelopment. The County jumped at the opportunity, knowing that Greenleaf Development, a green-leaning brownfields redeveloper, was looking for a site to build a hotel and winery. The property, located in the foothills, would make a lovely tourist attraction, would create local jobs, and help stimulate the local economy.

This would not be the first gold bearing property acquisition by the County. Years ago, it acquired another piece of property, known as the Lucky Strike, in a tax sale. The Lucky Strike property is believed to contain significant gold deposits, but the County, with its limited resources, has not been able to do anything to verify this.

The idea of acquiring another gold-bearing property seemed so attractive to County officials that they purchased the property from Sainte Devote "as is," without doing any due diligence, e.g., it did not have an environmental consultant do a report on whether and to what extent the property is polluted. The County Board of Supervisors was so enthusiastic for the new project that it voted 4-1 in favor of going forward. The one supervisor who voted "No" told a reporter "We just bought a pig in a poke."

The County purchased the property in 2006, and in order to make the site more attractive to Greenleaf, the County had its employees do some preliminary grading and clearing activity on the Mine property. The County irrigated the property with water from the Pit Lake, in an effort to grow vegetation to cover the unattractive Rock Pile. Sainte Devote, for its part, sold off all the mining equipment, dissolved its California subsidiary, and returned to Monaco.

Greenleaf began working on obtaining a permit for a hotel, winery, and tasting room. The project would, over time, generate 150 new jobs. As part of its permit application, Greenleaf sent soil engineers and hydrologists to do some testing. The soil and water testing revealed that both the water and soil on the site contained extremely elevated levels of arsenic, sulfate, and selenium. Greenleaf, with its extensive background in redeveloping contaminated sites, quickly concluded that the costs of dealing with the environmental issues at the Mine would far exceed any profits that could be generated by the proposed hotel and winery. Greenleaf even wondered if wine grapes grown in such conditions would make for marketable wines. At that point, Greenleaf told the County of Mirabeau it was not interested in going forward with the project.

The mine site, a blight for the past 4 years, sits unoccupied. The County of Mirabeau has tried to find other uses for the property, but no takers have emerged. The Pit Lake is gradually refilling, and will eventually spill into the nearby creek. The Rock Pile is likely leaking further contaminants into the groundwater aquifer every year during the rainy season.

The County has made every effort to find a redevelopment partner to get the site cleaned up, to no avail. Over the last four years, it has talked to several potential redevelopers, but each time, negotiations stalled out over the cost of cleanup. The County maintains that its lack of resources prevent it from taking action on its own.

Sainte Devote has retreated to Monaco after pulling the plug on its faltering subsidiary. The company is concerned that the State of California may file suit against it for clean up liability. Or worse. Sainte Devote has an inkling that the State may seek to impose liability on its president, Gascon Massanet, under the responsible corporate officer doctrine. (See generally *United States v. Dotterweich* (1943) 320 U.S. 815; *United States v. Park* (1975) 421 U.S. 658; *United States v. Starr* (9th Cir. 1976) 535 F.2d 512; *United States v. Blue Ribbon Smoked Fish, Inc.* (2001) 179 F. Supp. 2d 30, *affd. in part and vacated in part and remanded on another ground, United States v. Blue Ribbon Smoked Fish, Inc.* (2d Cir. 2003) 56 Fed.Appx. 542; *People v. Roscoe* (2009) 169 Cal.App.4th 829; Original Sixteen to One Mine, (Order No. WQO 2003 - 0006) 2003 Cal. ENV LEXIS 9.)

Round 1 – State of California v. County of Mirabeau

Water officials at the State of California are very concerned that the County of Mirabeau is doing little with the Mine site. The State is concerned about potential severe consequences in the future, if nothing is done now to address the problems posed by the Rock Pile and the Pit Lake. Accordingly, the State of California intends to sue the County of Mirabeau, in its capacity as the current site owner, to seek a court order directing the County to undertake cleanup.

Local residents living near the Mine are also concerned that their individual water wells may become contaminated as the groundwater levels increase in the Pit Lake. They want a guaranteed clean water supply.

Both the State and County understand that the County, as the current owner, is likely to be found liable for the cleanup at the Mine. (*Leslie Salt Co. v. San Francisco Bay Conservation, Etc. Comm.* (1984) 153 Cal.App.3d 605, 619-621.) Both parties also know that the County lacks funds in its budget to undertake significant cleanup. However, the State of California feels strongly that as the County willingly purchased the property from Sainte Devote, the County needs to address the cleanup, by either diverting funds from other County projects, finding a redevelopment partner for the property, raising local taxes, or pursuing whatever remedy the County may have against the former mine operator, Sainte Devote.

The costs for dealing with different issues at the Mine site are varied. Hoping to avoid an extensive lawsuit that would simply drain public funds from both the State and the County, the parties are ready to negotiate. The State of California will make an opening demand.

Round 2 – County of Mirabeau v. Sainte Devote

Having dealt with the State of California's demands for the site, the County now wants to recover as much as it possibly can from Sainte Devote. Sainte Devote, however, has told the County that the Mine site is the County's problem. The County was a willing purchaser, and bought the property "as is." The County knew it was buying a mine site, and the County should have known that such properties are typically associated with environmental liabilities. Sainte Devote has also pointed out to the County that it was Sainte Devote's California subsidiary that did the mining in California, not the parent company in Monaco, and the California subsidiary is now dissolved. Sainte Devote thinks it has a reasonably strong argument that there is no jurisdiction in California courts over the parent company.

The County, on the other hand, thinks there is a reasonably strong argument that the California subsidiary was an undercapitalized shell for the parent. (*In re Lifschultz Fast Freight* (7th Cir. 1997) 132 F.3d 339, 350; *Automotriz del Golfo de California v. Resnich* (1957) 47 Cal.2d 792.) There is evidence that officials from the parent company regularly visited California and reviewed mining operations. The company's president, Gascon Massanet, came to California from Monaco every 3 months for the entire time that Sainte Devote operated the Mine. The County believes it will be able to show that Mr. Massanet had a direct role in mine operations, including directing disposal of mining wastes. (See *United States v. Bestfoods* (1998) 524 U.S. 51; *Mathes v. P.T. Nat'l Utility Helicopters, LTD* (1977) 68 Cal.App.3d 182.) The County thinks jurisdiction will not be a problem, and that it can show that Sainte Devote purposely availed itself of California jurisdiction by operating in California. (See *Burger King v. Rudzewicz* (1985) 471 U.S. 462, 477; *Doe v. Unocal* (9th Cir. 2001) 248 F.3d 915; *Virtualmagic Asia v. Fil-Cartoons* (2002) 99 Cal.App.4th 228, 239;.)

Litigation over the jurisdiction question would be massively expensive for both the County and Sainte Devote. Accordingly, Sainte Devote has agreed to meet with the County to see if some less costly resolution is possible. Of course, Sainte Devote believes it can always walk away and go back to Monaco, and let litigation run its course.

The parties have agreed to meet to discuss an allocation of potential liability pursuant to the so-called "Gore factors" under CERCLA. These factors were named the "Gore factors" after a failed attempt by then Senator Albert Gore to amend CERCLA to include them in the statute.

The factors are:

1. the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
2. the amount of hazardous waste involved;
3. the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
4. the degree of toxicity of the hazardous waste;
5. the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

6. the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

(*Control Data Corp. v. S.C.S.C. Corp.* (8th Cir. 1995) 53 F.3d 930, 935.)

In mediation briefs exchanged prior to the scheduled meeting, the County of Mirabeau relied heavily on the case of *Waste Mgmt. of Alameda County, Inc. v. East Bay Regional Park Dist.* (N.D. Cal. 2001) 135 F.Supp.2d 1071, 1099 [court imposed a 95% cost allocation to a former landfill operator that caused the contamination and a 5% allocation to the current owner that purchased the property]. Sainte Devote, on the other hand, relied heavily on the cases of *Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp.* (9th Cir. 1992) 976 F.2d 1338, 1342 [excavator liable for moving contaminated soil at the site], and *United States v. Honeywell International, Inc.* (E.D. Cal. 2008) 542 F.Supp.2d 1168, 1199 [owner/developer liable for excavation, grading, and further development].

For purposes of Round 2, the parties are to assume that the County of Mirabeau spent \$3 million at the site in an initial effort to satisfy the government regulators. Estimates are that an additional \$17 million will be required to complete cleanup efforts. Mirabeau believes the majority of past and future remediation costs should be paid by Sainte Devote. Sainte Devote, of course, thinks the County, which took the property “as is,” should pay those costs. The County of Mirabeau will make the opening demand.